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Federal Communications Commission
CG Docket No. 02-278

Comments of Gerald Roylance on Petitions for State Preemption

The FCC received several petitions about preempting stricter state laws when a telephone call crosses state boundaries. (Express Consolidation, Inc. / Florida[1], American Teleservices Association / New Jersey[2], FreeEats.com, Inc. / North Dakota[3]). For several reasons, the FCC should deny or ignore these petitions. Briefly, the TCPA does not preempt the field, the petitioners desire unequal protection for their telemarketing, the petitioners want an interpretation that will confuse the public, and some issues are already pending before a court.

Petitioners seek a declaratory ruling to preempt state law. Petitioners claim it is too burdensome to keep track of various state laws or to purchase additional do-not-call lists. For example, state laws may have a more restrictive definition of an established business relationship.

The issues in the petition are close to those in *State v. Heckel*[4]. In *Heckel*, the Washington State Supreme Court found that the state could regulate unsolicited commercial e-mail from out-of-state senders. The court used the rationale in *Pike v. Bruce Church, Inc.*[5]: neutral regulation of a legitimate local interest coupled with a balancing of local interests against interstate burdens. Petitioners do not contest that regulating telemarketing is a legitimate local interest. Petitioners do not claim such laws discriminate against telemarketers in foreign states, nor do they claim the effect on interstate commerce is other than incidental. Petitioners merely claim the burden is too high. However, instate telemarketers bear the same burden as out-of-state telemarketers. They must purchase the same do-not-call lists, and they may not place certain prohibited calls.

The *Heckel* case is also good because it was before the CAN SPAM act preempted the field. Congress knows how to preempt the field when it wants to.

Petitioners also believe that tax-exempt nonprofit organizations have a right to ignore do-not-call lists and use prerecorded calls. When Congress passed the TCPA in 1991, it did not consider telephone calls by charities to be a big nuisance. Congress recognized that charitable solicitations might become a problem that it could revisit later[6]. Although Congress limited the FCC's power to act on non-profit solicitations, it allowed states to impose requirements that are more restrictive.

Petitioners real goal is to bypass reasonable state laws and expand their business.

More Restrictive Requirements

The TCPA clearly allows states to impose more restrictive requirements. Petitioners do not contest a state's power to impose those requirements. In fact, Congress explicitly mentioned that states

[1] CG Docket No. 02-278, DA 04-3186, October 4, 2004
[2] CG Docket No. 02-278, DA 04-3185, October 4, 2004
[3] CG Docket No. 02-278, DA 04-3187A
[4] *State of Washington v. Heckel*, 143 Wash.2d 824, 24 P.3d 404 (2001).
[5] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).
[6] 47 USC § 227(c)(1)(d)

may prohibit, among other things, sending unsolicited fax advertisements, using automatic telephone dialing systems, using prerecorded messages, or making telephone solicitations[7]. Congress clearly contemplated that some states would issue blanket prohibitions against, for example, any and all prerecorded messages. A state has complete freedom to restrict these activities; the state need not exempt charities from the prohibition.

Although petitioners do not dispute a state's power to protect its citizens with more restrictive requirements, petitioners want us to believe that a state's authority to protect its citizens is limited when the call comes from outside its borders. The belief is illogical. When Congress permitted a state to decide that prerecorded calls are too intrusive to its citizens and ban them completely, Congress was not expecting an out-of-state exemption for similar calls. Congress would not believe out-of-state prerecorded calls were less intrusive than in-state calls. Congress would not expect a state to outlaw only in-state prerecorded calls.

In a similar vein, if a state makes its own do-not-call list, the reasonable interpretation is even out-of-state callers must obey those do-not-call requests. Furthermore, Congress required that the state list overlap a national do-not-call list[8]. A telemarketer need only purchase a state list. Both instate and out-of-state telemarketers confront the same burden.

Where the Injury Occurs

From a practical standpoint, Petitioners want an unreasonable exemption from state law.

Consider a simple homicide. Alan and Bob are in Florida. Alan shoots and kills Bob. Bob is injured in Florida. The laws of Florida apply, and Florida may try Alan for murder.

Petitioners adjust the scenario a little bit and want to change the conclusion. They want Alan standing in Georgia and firing the bullet across the state line into Florida. Petitioners would point at the interstate bullet, and say that Florida law does not apply. However, Bob is still injured in Florida. Alan directed the bullet across state lines. Alan could reasonably expect to face a murder charge in Florida.

A state wants to protect its citizens from injury. Within its borders ("intrastate"), the state should be able to define those injuries and their penalties.

Excessive Burden

Petitioners claim an excessive burden, but that is not case. The burden that must be balanced is the burden imposed on interstate commerce that is not imposed on instate commerce. Out-of-state telemarketers are not being charged more for do-not-call lists; they are being charged equally. A legitimate concern is when a Georgia shrimp boat must pay ten times the license fee. Out-of-state telemarketers are not being forced to build instate facilities or employ resident telemarketers. There is no additional burden to interstate commerce.

Petitioners' main argument appears to be the cost and trouble of following regulations in all 50 states. Paradoxically, one commenter complains that small businesses are burdened because they don't have the resources to track all the regulations in multiple states[9].

Most small businesses are not making unsolicited telemarketing calls across state lines. Most small business have local customers and need only worry about the TCPA and its own state laws. Most realtors in Tucson may safely ignore Maryland law. Learning one's own state laws cannot be a burden.

[7] 47 USC § 227(e)(1)
[8] 47 USC § 227(e)(2)
[9] Comments of the Broadcast Team, Inc., November 4, 2004.

Businesses that mount multi-state calling campaigns are a different affair. They must worry about state laws, but they are also going after many more customers, so the added effort is not a burden. The average state has a population of 300 million / 50 states = 6 million. When a telemarketer goes after six million customers, then he should do his homework about the state laws.

The alleged amount of work is not a big burden – and it is a burden that telemarketers can share. Some enterprising organization (such as the DMA or ATA) will compile a pamphlet that summarizes the various state requirements and sell it. An individual business need not embark on its own examination of all state laws. In fact, a small business might employ a particular telemarketing company (e.g., The Broadcast Team, Inc. or DialAmerica) precisely for its knowledge of applicable statutes and/or its possession of relevant do-not-call lists.

Furthermore, many businesses must already examine state regulations due to the nature of their business. Mortgage companies and building contractors must have state licenses. Insurance companies must have a bond or an insurance certificate.

Although petitioners complain of a huge burden, that burden is just not there. Telemarketers already must purchase or otherwise access the National DNC list. By comparison, learning about the appropriate state laws is a small cost. The petitioners' real goal is to avoid the more restrictive requirements that states may impose.

Unequal Protection

One of the prongs of the *Pike* test is an evenhanded treatment of interstate and intrastate commerce. The petitioners agree that Congress allows states to impose more restrictive intrastate requirements[10]. Petitioners then want an "intrastate requirement" to apply to only intrastate calls. Petitioners want interstate calls to be free of the more restrictive intrastate requirements. The *Pike* test does not allow either one to be favored.

The proposed interpretation is absurd because it creates a dual standard. For example, the TCPA allows interstate calls between the hours of 8AM and 9PM. Assume a state further restricts telemarketing calls to between 9AM and 8PM. Under petitioner's interpretation, an out-of-state telemarketer would have the advantage of two more hours to call state residents. Laws should apply equally to every one. A competing in-state telemarketer would argue the petitioners' interpretation denies him equal protection of the law, and he would be right.

Furthermore, if FCC accepts the petitioner's interpretation, then states would effectively lose the more restrictive requirements they imposed to protect their citizens. If the intrastate requirements do not apply to interstate calls, then a company would just hire out-of-state telemarketers.

Petitioners are trying to make a back-door preemption of the field. Petitioners want the FCC to interpret a state's telemarketing regulations so narrowly that they would offer practically no protection beyond the minimal TCPA requirements. Statutory interpretation does not allow that result.

Long-Arm Statutes

Out-of-state defendants may be subject to state laws. The modern basis of personal jurisdiction includes minimum contacts[11]. Requiring a telemarketer who calls into a state to follow state laws does not offend "traditional notions of fair play and substantial justice." Petitioners have not argued that the playing field is unfair. In fact, they argue the opposite –—they want the playing field to tilt in favor of out-of-state calls. Such a benefit is unfair; following state laws is not an unfair burden or a substantial injustice.

[10] 47 USC § 227(e)
[11] *International Shoe v. Washington*, 326 US 310.

Constitutional limitations on out-of-state jurisdiction do not apply. Out-of-state telemarketing is systematic and continuous. The telemarketing is purposely directed toward the forum state. The telemarketer purposely avails himself of the privileges of the forum state. The possibility of litigation is foreseeable. In fact, petitioners foresee litigation so clearly that they asked for a declaratory ruling about preemption.

Telemarketers are subject to long-arm statutes. There is nothing outwardly unreasonable about out-of-state telemarketers obeying the same laws that apply to in-state telemarketers. Petitioners do not attack the reasonableness of long-arm statutes. Petitioners just do not like more restrictions.

States Have Good Cause for Stricter Regulation

When Congress set statutory damages at up to $500 per violation, it was balancing the interests of residential subscribers with telemarketers. Presumably, Congress sought an amount that would discourage telemarketers from breaking the law but would not bankrupt a telemarketer for an occasional mistake. The amount was also set high enough to encourage private lawsuits in small claims court.

It appears that the statutory damage amount is too low to discourage some offenders. When one company sent out 90,000 unsolicited faxes in violation of the TCPA, only one recipient sued[12]. The low rate of lawsuits implies a litigation cost of only $500 per 90,000 calls – about 0.6 cents per call. Given that labor costs for a live call are about 5 to 15 cents[13], it becomes economically practical for a company to break the law and pay the judgments.

Companies such as P & M Consulting, Inc. appear willing to use prerecorded telemarketing and pay occasional settlements. The FCC cited P & M Consulting for using prerecorded calls on October 29, 2002[14]. Marilyn Margulis independently sued P & M Consulting for a prerecorded call and won 500 dollars[15]. The Wisconsin Department of Justice sued P & M in September 2003[16]; P & M settled for $4,917[17]. P & M Consulting continued to make prerecorded calls in April 2004[18] and May 2004.

Furthermore, some companies frustrate suits by hiding their identity, failing to register with Secretaries of State, and refusing to pay judgments.

The TCPA statutory damages are not an adequate deterrent for some telemarketers. States have a legitimate reason for imposing more severe penalties. Several states, such as Missouri, have substantially stiffer penalties. To protect its citizens, those stiffer penalties must apply to out-of-state callers.

Consequently, stricter statutes are within the police power of the state.

Express Consolidation, Inc.

The Express Consolidation petition is a sham. The matter is currently before a competent court. The petition only raises the possibility of inconsistent decisions. The Florida court should decide the issues. However, the FCC should recognize the elements of the sham.

Express seeks the alleged preemptive protection of an interstate call. However, Express Consolidation is a Florida corporation. The complaint alleges Express called residents of Pinellas County,

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[12] *United Artists Theatre Circuit v FCC*, 147 F.Supp.2d 965.
[13] Assuming a telemarketer is paid $6 to $18 per hour for a 30 second call.
[14] EB-02-TC-256
[15] *Margulis v. P & M Consulting*, 121 S.W.3d 246 (2003).
[16] http://www.wisinfo.com/postcrescent/news/archive/local_12174327.shtml
[17] http://www.doj.state.wi.us/news/nr052504_CP.asp
[18] http://www.smallclaim.info/pmconsulting

Florida[19]. The only glimmer of an interstate call is the alleged use of an out-of-state telemarketer. Under Express Consolidation's view, one can avoid state law by hiring an out-of-state agent. The proposition is absurd. Every one would just use out-of-state telemarketers.

The Express Consolidation calls violate the TCPA.

There is an issue of material fact whether the calls were on-behalf-of a tax-exempt nonprofit organization. Florida alleges Express was selling goods or services[20]. The calls may have been on-behalf-of a commercial debt services firm and/or licensed attorney Randall Leshin. Listen to the Express Consolidation recordings in April and May 2004 on Private Citizen's website[21].

There is an issue of material fact whether the messages properly identified the caller.

There is an issue of material fact whether the calls contained an unsolicited advertisement for debt counseling services. If the calls contain unsolicited advertisements, then there is no FCC exemption for the prerecorded call[22]. Express Consolidation's website FAQ page describes

> **9. How much does it cost ?** Express Consolidation is a non-profit organization. We charge no application fee, no interest or late fees. Some creditors will make a tax-deductible contribution to Express for servicing your account with them. There is a reasonable administrative fee which is calculated directly into your monthly payment. The administrative fee is typically far outweighed by the savings in reduced interest rates & credit card fees.[23]

If a creditor will make a tax-deductible contribution to Express, why wouldn't the creditor just reduce the consumer's debt by the same amount? Is there a fiduciary duty here? Some credit-counseling firms require consumers to have a very large debt. Does Express only accept clients who owe creditors that Express knows will make the contributions?

The FCC should penalize Express Consolidation, Inc. for filing its petition by launching its own investigation of Express Consolidation's prerecorded calls. If the FCC finds that the prerecorded messages did not offer proper identification or were unsolicited advertisements, then it should issue a NAL/forfeiture.

Conclusion

The FCC should deny the petitions. States may impose stricter intrastate requirements on telemarketing. The FCC should clarify that long arm statutes apply and that out-of-state callers must respect intrastate requirements. The laws reflect a legitimate local interest. They affect interstate commerce incidentally. They are not designed to favor local interests at the expense of foreign interests. If there is additional burden on foreign telemarketers, it is slight and a reasonable balance of interests.

Furthermore, the FCC should withdraw its general invitation to examine state telemarketing laws.

[19] Express Consolidation Petition, Ex. A, paragraph 5.
[20] Express Consolidation Petition, Ex. A, paragraph 6.
[21] http://privatecitizen.com/junk-calls
[22] 47 USC § 227(b)(2)(B)(ii)(II)
[23] http://www.expressconsolidation.org/faq.asp